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ABSTRACT

Proficiency, or competency, testing is a recent attempt to meet the public demand for accountability. But instead of placing the responsibility on the educational organization, competency testing appears to be a sophisticated approach to holding students and teachers accountable. Although some form of student assessment is needed, it is not yet certain that minimum competency testing is the answer. Educators must carefully scrutinize minimum competency testing programs if the inevitable legal challenges to this testing are to be withstood. Several types of court cases provide insight into legal problems created by proficiency testing. Plaintiffs contend that these tests discriminate against minorities, deny due process, and are culturally or linguistically biased. Educators and legislators must be willing to learn from these cases so that injuries to students can be minimized. (Author/JM)

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MINIMUM STATE PROFICIENCY REQUIREMENTS FOR HIGH SCHOOL GRADUATION: ACCOUNTABILITY FOR WHAT AND TO WHOM?

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Introduction

Accountability in public schools is a topic frequently discussed by state legislators, the lay public, and the public school officials themselves. "The word has come, through a peculiar metamorphosis, to be associated with the imposition of management practices borrowed from business, with the filling out of detailed forms to be submitted to faceless bureaucrats, and with a societal suspicion that education needs more control and supervision in order to become more [effective]."[1] But more specifically, what is the nature of this current insistence upon accountability? Erosion of community support, growing financial burdens, distorted priorities, and public concern for rapidly worsening social problems for which the schools are perceived as significantly responsible -- all of these factors and more contribute to the current demand for educational accountability.[2] The critical questions of what accountability is, how it can be implemented, and what effectis will it have on educational organizations remain to be answered.

Rather than ignore this demand for educational accountability, educators should begin to analyze the extent to which their policies, programs, and practices can be modified to increase student achievement.

One such approach currently being considered by some educators and implemented by others, to increase a school's accountability for its students prior to their high school graduation, is proficiency testing.

The question of whether tested proficiency as a high school graduation requirement can help educators meet the public's demand for teaching and learning accountability has yet to be answered. The demand for minimal competency mastery has, however, emerged in part because a substantial

number of students receiving high school diplomas have been proven to be functionally illiterate. Citizens, legislators, and some educators see proficiency testing as a way of assuring "that the diploma will cease to be a meaningless, counterfeit document."[3] But, others view this approach as a more sophisticated means for denying minorities equal educational opportunity.

Educators thus find themselves in a quandary. On the one hand, the education profession and society in general will no longer be tolerant of students leaving high school functionally illiterate. On the other hand, educators cannot implement proficiency testing programs before they address the key issues that determine whether such programs can both succeed and avoid an adverse impact upon a large portion of the student population.

This current interest in proficiency testing may simply be another fad. Nevertheless, proficiency or competency testing programs have been implemented in more than forty states, and almost all of the remaining states have studied or are studying proficiency testing programs.

This article discusses the potential proficiency testing has for improving the delivery of educational services and thereby improving students' performance. Before discussing these proficiency testing programs, however, I will review the historical development of the concept, in order to put the issue into its proper perspective.

Proficiency Testing Programs: The Societal Setting

The quest for educational accountability is not new, it is, in fact, woven into the historic fabric of this country. But even beyond this country, it is safe to say that accountability is as old as civilization

itself. In Athens, around 490-429 B.C., the Kleisthenean Constitution provided that magistrates periodically come before the people and account for their actions.[4] In 339 B.C. when the "hemlock touched Socrates' lips, history recorded for the first time the act of holding a teacher accountable for what he was teaching."[5] Plutarch, more than two millenia ago, counseled, "Fathers, themselves, ought every few days to test their children, not rest their hopes on the disposition of a hired teacher; for even those persons will devote more attention to the children if they know they must from time to time render an account."[6]

Accountability has always extended beyond what was taught to the process of teaching itself. During medieval times students frequently paid their professors and tutors directly. According to Friedrich Heer, "The students, who had the whip hand, kept their professors to a punctual observance of the lecture timetable, under threat of financial penalties, and revenged themselves on unpopular teachers by boycotts."[7]

What is Accountability?

Before establishing a definition of accountability as it is used in this discussion, I should note that much of the confusion surrounding educational accountability grows out of the fact that educators frequently seek to identify mechanisms for demonstrating that they have a clear understanding of "what it is owed and to whom it is owed."[8]

Performance contracting, statewide assessment, and management by objectives represent only a few of the techniques citizens and government use or invoke to make educational organizations more accountable; yet, these techniques do not provide a clear definition of accountability for those in the education professions.

Accountability according to Webster's Collegiate Dictionary, is defined as the quality or state of being accountable, or subject to giving an account, answerable, capable of being accounted for, explainable. To be accountable, then, is to be held answerable for one's actions.

Much more recently, only within the past 25 years, accountability has been effected by way of stated educational goals, teacher evaluations, student assessments, instructional and program evaluations, budgetary allocations, and the job descriptions of school administrators. Disenchanted with the meager successes of compensatory education programs, President Nixon announced in 1974 that "school administrators and school teachers are responsible for their performance and it is in their interests, as well as in the interests of their pupils, that they be held accountable."[9]

In the past, accountability centered on what should or should not be taught, with the responsibility for learning residing primarily with the student. This point of view has changed; now the educational institution must guarantee the learner's success.

One problem associated with providing a clearer definition of accountability is determining to whom it is owed. In passing their proficiency testing statutes, some state legislatures hold school districts accountable for student performance. The primary assumption here is that the locus of responsibility resides with educators at the classroom level. Since education is not apolitical, however, it is safe to conclude that messages communicated by the schools, on the one hand, and the legislators, on the other, to their shared and disparate constituencies, must take into consideration the needs and dispositions of these constituencies. No

longer can educators offer the traditional response that the board holds the superintendent responsible, and that, in turn, the superintendent holds the principal accountable for the success of failure of a given program. Building principals, of course, traditionally viewed the classroom teacher as the primary link in student mastery of educational objectives, and the teacher, in turn, held the students accountable for the acquisition of the requisite skills.

This response should no longer be offered without a clear understanding of the support that must be provided to students, teachers, and aministrators if accountability is to become a reality. This support means providing monetary resources as well as in-service training.

Proficiency Testing: A Recent Invention

Unlike general accountability, proficiency testing or competency testing is a recent "invention" supposedly designed to meet the public demand for accountability by placing the responsibility for achieving high school literacy on the educational delivery system, rather than on the learner. But instead of placing the responsibility on the educational organization, competency testing appears destined to become simply a more sophisticated approach for holding students and teachers accountable. William Ryan refers to this phenomenon as "blaming the victim." "Victim blaming is cloaked in kindness and concern, and bears all the trappings and statistical furbelows of scientism; it is obscured by a perfumed haze of humanitarianism."[10] The point here is that, at least in some instances students may be held responsible for their own miseducation.

Legislators, Legislation and Confusion: A Dilemma

The spate of recent competency testing legislation should come as no surprise to educators, especially when one takes the current fervor of California's Proposition 13. Like Proposition 13, competency testing legislation evolved from citizen pressure rather than from the careful deliberation of professionals. Ironically, this lay leadership is the main reason educators can neither stop nor even slow this snowballing educational trend so that they can address the issues critical to the success of minimum competency testing dispassionately. Nevertheless, the responsibility for any proficiency testing failure will inevitably be laid to the educators.

The enactment of the state statutes, the promulgation of rules and regulations, the establishment of procedures, and the implementation of competency testing legislation have occurred as quickly that those advocating this superficially legitimate cause discourage persons of reason and good will from taking a contrary position. The fact that laymen extol minimum competency testing as the last chance for educators to correct past mistakes imbues its supporters with practical immunity. This immunity in fact, shields the issue from the scrutiny if requires.

A similar problem occurred with the Family Educational Rights and Privacy Act of 1974, more often referred to as the Buckley Amendment, which became law beofre its significance was recognized.[11] The amendment was adopted without any debate. Discussion never arose in formal hearings "to explore potential problems of, or reactions to, the subject matter,"[12] and the amendment's sponsor(s) "seem not to have been adequately prepared

to respond to some of the controversial issues raised."[13] Thus, the problems inherent in the Family Educational Rights and Privacy Act legislation were misunderstood. Similarly, little or no attention has been given to analyzing the effect of competency testing upon education before it becomes law.

Legislators, of course, have an obligation to examine carefully even the most politically expedient legislation and to consider the problems that could arise from that legislation. The failure to exercise in this legislative planning in the realm of minimum competency testing may partly account for the discriminatory nature of some competency testing. Thus, citizens have already begun to litigate the application of the legislation with school districts and with state departments of education. Moreover, those school officials charged with implementing the proficiency testing programs have begun to express their discontent. Many of these officials, in fact, have no clear understanding of the legislation's intent. Inevitably such failure of understanding and lack of expertise, combined with the haste to implement competency testing programs, can result only in difficulty.

An additional concern for both legislators and educators is the need to coordinate different but related legislation. For example, the Connecticut legislature recently enacted Educational Evaluation Remedial Assistance (competency testing), and Comprehensive Planning legislation. In addition, the legislature has been directed by the State Supreme Court to draft a more equitable state-aid formula. It is, however, the Connecticut Department of Education, not the legislature, that must coordinate the activities

generated by the legislation, and to implement the aforementioned legislation, the Department of Education needs resources beyond those allocated by the legislature. Thus, at least in Connecticut, competency testing may be doomed to bureaucratic oblivion, with the educators charged with its failure.

The Impact of Competency Testing

Those in the educational community have yet to feel the full impact of the recent competency testing legislation. As I mentioned, our citizens now count on legislation to eliminate the illiterate high school graduate. As schools in Oregon and California wrestle with implementing their minimum competency testing programs, dissatisfaction appears to be increasing. Some believe that minimum competency requirements will reduce the quality of education to the lowest common denominator and impede the progress of more advanced students. Others express concern that teachers have begun to concentrate almost exclusively on minimum knowledge and competence. Some administrators and teachers find themselves confronted by yet another avalanche of paperwork.

Finally, some critics cite simple (or apparently simple) test questions as evidence for hypocrisy in competency testing. It is safe to say that the overall impact of competency testing has not fallen uniformly on the school districts where it is being implemented.

Some observers believe that proficiency testing may indeed represent one approach for helping us improve student achievement. Others caution, however, that care must be taken to keep proficiency testing from violating the constitutional or statutorial rights of students as well as "diverting

attention from the equalization of educational opportunity by arguing for the need to raise low academic achievement." Those concerned about the success of minority students should realize that proficiency testing "may not only narrow the range of things schools choose to teach, it may also crowd out cultural pluralism and social diversity by devaluating those qualities not measured by the test."[15]

Although proficiency testing appears to be having a disproportionate effect upon minority students, non-minority students are also failing to meet the standards. Time does not permit a complete analysis of how proficiency testing effects minority students. But, a discussion of four cases may provide some insight into how proficiency testing is, in some instances, perceived among minorities.

The Attendant Judicial Decisions

> "If the law supposes that, said Mr. Bumble, squeezing his hat emphatically in both hands, the law is a ass -- a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience -- by experience."[16]

Mr. Bumble's message in Oliver Twist leads appropriately to a discussion of the legislative and judicial considerations related to the issue of minimum competency testing. Legal inquiries into proficiency testing tend to occur as a result of potential or actual student injury. Thus far these challenges generally concern the potential denial of a high school diploma.

> The challenges are directed towards specific features of existing minimal competency programs such as fairness of testing procedures vis a vis instruction, the bias toward certain racial, ethnic and special needs populations, the failure to provide necessary remedial services; the lack of sufficient phase in time, etc.[17]

If we want to minimize litigation we must address these and other factors. For example, decisions are being made about, and sanctions are being applied against, individual pupils; this is not the case in the usual testing situation.[18] To date, only a few lawsuits have involved minimum proficiency testing programs directly. These suits typically allege that an administrative unit exceeded its authority or that certain procedural steps in the process were faulty and had a potential for violating the constitutional rights of the petitioners.

Litigation: A Response to Minimum Competency Testing

Critics of minimum competancy testing have begun to challenge such specific features as the fairness of testing procedures vis-a-vis instruction; the biases for or against certain racial, ethnic, and special-need populations; a failure to provide necessary remedial services; and a lack of sufficient time to implement procedure.

These challenges address imminent or actual injury to students. All the cases so far make one point clear: If lawsuits are to be avoided, or challenges to minimum competency testing are to be withstood successfully, state departments of education, legislators, and school district officials must take steps not to violate the rights of students.

To date, the litigation concerning minimum competency testing filed on behalf of plaintiffs has questioned (1) its constutionality; (2) "certain procedural steps in the Process"[19]; or (3) whether an administrative unit exceeded its authority. Although litigation centered directly on minimum competency testing is not yet abundant, existing or prospective challenges focus or will focus on "(1) a denial of equal protection under the law;

(2) violations of Title VI of 1964 Civil Rights Act; (3) denials of procedural due process, and (4) denials of substantive due process."[20] In addition, future legal challenges to minimum competency testing may also hinge on allegations of educational malpractice.

Title VI and the Equal Protection Challenges

Most of the opposition to minimum competency testing so far has centered on the idea that the tests discriminate against minority students or students whose first language is not English and that this discrimination precludes these students from receiving a high school diploma instead of a certificate of attendance. Although a substantial number of non-minority students cannot successfully pass the competency tests, a disproportionate number of minority students test below the minimum standards.[21] School officials contemplating or implementing minimum competency testing programs must anticipate these allegations. Fair, culturally neutral testing thus becomes a prerequisite to any Title VI challenge.

The first minimum competency test case alleging that the testing program discriminated inequitably against Black students has reached federal court in Florida.[22] This case, filed in the Federal District Court for the Middle District-Tampa Division, seeks to protect the interests of ten Black high school students and all other similarly situated students who failed to meet Florida's minimum educational standard. The plaintiffs allege that the competency tests and the statute inequitably discriminate against Blacks, that the test lacks validity and reliability, and that those skills measured by the tests differ from what is taught in schools. Rather than seek an injunction, the plaintiffs are attempting to prove the competency testing statute unconstitutional.

Title VI challenges of this type are especially difficult to withstand in desegregated communities where (on the one hand) one would like to find evidence that students are not regressing yet (on the other hand) one would want to identify those students with particular learning needs.[23] When test results contribute to the resegregation of students, one must take care to ensure that the constitutional rights of these students are not breached.[24]

This issue was in fact, addressed by the United States Supreme Court in Gaston County, North Carolina v. United States[25] when it considered whether a literacy test or education requisites actually served to deny the right to vote to persons of a certain race or color. It is important to note that once the state maintained separate inferior schools for its Black citizens who were of voting age.[26] Justice Harlan, speaking for the majority of the Court, stated that making education available equitably would prepare Black youths to meet the literacy standard when they reached voting age. Although Justice Harlan said the equalization of opportunities for parents is of little value, [we] cannot escape the sad truth that throughout the years, Gaston County systematically deprived its [Black] citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.

The case of McNeal v. Tate County School District[27] further expanded upon the "prior effects" principle. Here, the court held that tests used to determine ability groups relied on the holding in Singleton[28] and Lemon.[29] That is, that the school districts must have operated for at

least several years as a unitary system. This criterion would suggest that a district had allowed sufficient time to assure that underachievers were not produced by past educational inequities. Thus, the Court established the need for a school district to demonstrate that it has eliminated the negative effects of past segregation by enabling underachievers to function on the same level as their peers.

The prior effect principle also appears in the HEW regulations implementing Title VI of the 1964 Civil Rights Act. These regulations forbid practices that have the effect of discriminating against persons on the basis of race, color, or national origin. This criterion was applied by the U.S. Supreme Court in Lau v. Nichols,[30] a case in which the Court prohibited a school from carrying forward the consequences of its past discrimination. Thus, culturally or linguistically biased testing is unlikely to withstand a Title VI challenge. Moreover, the failure to design a testing program that takes the needs of students dominant in a foreign language into consideration invites a suit under Title VI.

It is fair to say that these Title VI challenges will be examined on a "program-by-program" basis, we [the court] do not mean to indicate that a program must be considered in isolation from its context."[31]

This point was addressed in Diana v. California State Board of Education,[32] when Spanish speaking children were placed in an educacably mentally retarded class as a result of scores on a Stanford-Binet test that had been administered in English. Tested by a bilingual psychologist and permitted to answer in either English or Spanish the children achieved test scores that improved on the average by fifteen points. The concerned parties

reached agreement, thereby avoiding a Court decision. The agreement stipulated that henceforth placement tests of students dominant in a language other than English would utilize the student's dominant language and English.

In Washington v. Davis the United State Supreme Court noted that the disproportionate impact of a testing program on one racial group "is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[33] Thus, a test which has a disproportionate impact upon a particular racial group in itself does not necessarily violate the Equal Protection clause. To prove unconstitutionality, a plaintiff must demonstrate that the intent of the testing program was to discriminate racially.

Yet another area with which educators should be concerned is ability-grouping or tracking. The courts have not said that all such "classifications" are unconstitutional, even when a plaintiff has been able to establish a prima facie case. Establishing a prima facie case requires a plaintiff to prove (as one did in Hobson v. Hansen[34]) that the following incidents related positively to the testing program:

1. A racial imbalance existed between tracks or ability groups;
2. The standardized ability tests used to classify students were cultural biased against Blacks and other low income students; and
3. A woeful lacking of compensatory or remedial programs had the effect of keeping lower track students on the lower track.[35]

Critics also voice objections to minimum competency testing programs because of the potential problems they may represent for handicapped students.

One problem, for example, is whether the prerequisite of competency standards for a high school diploma should apply to the handicapped. Of course, maintaining different educational standards for handicapped students is, itself, a potential problem. But, differentiated diplomas reflecting different standards should be addressed with caution.

Substantive and Procedural Due Process

Another argument that has been raised against competency testing programs is that students denied a diploma may, without proper notification, have had their procedural rights violated. Tu fulfill procedural due process as it relates to competency testing, educators must make certain a student has had sufficient time to protect his or her interest.[36] Generally speaking, prior notice and a hearing must be provided before an individual can be deprived of a constitutionally protected right. Therefore, one could argue that notifying students during their first or second year of high school is inadequate notice of a minimum competency requirement for receiving a diploma.[37]

This issue of procedural due process was raised in Brady v. Florida State Board of Education.[38] In this case, John Brady, an eleventh grade student was required to take both a functional literacy and a basic skills test. On the functional literacy test in reading he scored in the 99th percentile, and in the 94th percentile in mathematics. Although he answered 91 percent of the items correctly on the basic skills test, he did not meet two of the 22 standards incorporated in the Basic Skills Test and stipulated by the State Board of Education in its Rule 6-A-1.941 as a required minimum competency for eleventh graders. (Brady misused the apostrophe and used

faulty capitalization.) He was removed from his regular English composition class and required to enroll in an 18-week remedial course. But because John Brady scored 90 percent on a pre-test he was allowed to take an Independent Study.[39]

The petitioner's father called the courts attention to the following requirements established by the Florida State Department of Education:

1. Students must master half of the skills and correctly answer 70 percent of the items in each component of the test.
2. A student must achieve one correct answer if there is one item on a particular skill, two correct answers for two items, up to nine. When ten ore more items concern a given skill, the student must answer 70 percent correctly.

Since a public hearing had not been held, Brady's father alleged that the cut-off scores were illegal. He further contended that the 70 percent criterion and master performance standard had "worked in tandem to label John Brady, as a failure statistic on a state, district, and school level."[40]

A hearing examiner in June, 1978, upheld the claim that the scoring criterion was invalid since it had not been promulgated in accordance with the Administrative Procedure Act.

In two related cases Brady v. Turlington[41] and Blount v. Turlington[42] the petitioners challenged the proposed Rule 6-A-1.942, contending that this rule constituted an invalid exercise of delegated legislative authority on the following grounds:

1. Notice deficiencies,
2. Invalid retroactive scoring of the previous year's tests,

3. A violation of the one-subject requirement of F.S. 120.54(8),
4. An invalid delegation of power to the Commissioner of Education,
5. The arbitrariness and unreasonableness of the scoring criterion as it relates to the standards tested, and
6. A faulty economic impact statement.[43]

The hearing examiner found that proposed Rule 6-A-1.942, as amended, did not constitute an exercise of invalid delegated legislative authority even though it had an impact on the petitioners.[44]

Another argument raised by some critics of competency testing programs is that they may violate the substantive rights of students, and substantive due process principles have, in fact, been breached.

Educational Malpractice

I hope that legislators and educators alike benefit from the experiences of others before hastily adopting competency testing legislation. Some of these experiences bear upon the potential legal issues surrounding educational malpractice, and one such issue is that some of the competency requirements are so low that virtually anyone can master them. For example, I have been told that one school district tests for such skills as telling time, taking a shower, and constructing a peanut butter and jelly sandwich.

In the past, educators have found themselves involved in litigation concerning issues of student care and safety. The whole idea of educational malpractice represents a shift from such issues to educational outcomes. Although the New York Court of Appeals recently ruled in favor of the plaintiffs in a suit involving educators, the question is whether competency

testing may provide yet another opportunity for individuals to seek relief through the judicial system for the apparent failure of educators to discharge their duties. I think it will.

Although the Court did not rule for the plaintiff, the Doe case provides some insight into the direction litigation in this area will take. The Doe case concerned a young California person who could read only at the fifth grade level when he graduated from high school. The Superior Court of California ruled that mere educational failure was not an "injury" within the meaning of tort law.[46] The Court dismissed the suit on these three grounds: First, the State's sovereign immunity shielded its officers, agents, and employees from liability for injury resulting from negligence.[47] Second, it violated public policy to hold a school district accountable for a duty of care in the discharge of its academic functions.[48] Third, "since there exist no readily acceptable standards with regard to classroom methodology, what constitutes accepted practice in the science of pedagogy cannot be settled."[49]

But, cases such as Wood v. Strickland[50] and Monell v. Department of Social Services, New York City[51] have begun to erode the doctrine of sovereign immunity, making it possible for Peter Doe-like negligence actions to gain standing. The courts and legislatures "recognize that harsh results may flow from the invocation of sovereign immunity barring relief where justice and common sense demand it."[52] Just as a shift has occurred with respect to immunity, so a growing trend suggests public support for holding educators accountable for discharging their pedagogical duties.

Thus, the establishment of minimum competencies and the development of competency tests really mean that a minimal level of performance has, in

fact, been established and that a means for determining the extent to which the students are below or above that particular level has been agreed upon. Now assume that the tests are administered to students in grades 4, 8, and 9. Depending on the design of those tests and on how the results are computed, a gifted student may score below the expected level and a slow student may score well. Who is to blame, the students or the system? The commitment to provide additional support in the form of remediation raises other questions about what constitutes educational "due care" in helping students meet basic standards.

That the courts will agree, someday soon, to hear arguments that schools should bear responsibility for the consequences of their acts seems nearly inevitable. Minimum competencies, so important in the Doe case but nonexistent at the time in any other states, have now become widespread. Even those who agreed with the plaintiffs in Doe would probably agree that placing a student who could read at only a fifth grade level in a college preparatory English class would not be the act of an ordinarily prudent educator. And, more and more parents are seeking judicial relief in just such situations as this, and questions addressing the competence of students who graduate from high school have increased and spread.

Another concern frequently raised about competency testing programs is the extent to which the tests are culturally or linguistically biased. "While substantial numbers of white, middle-class students cannot meet minimal competency standards,[53] testing programs generally discover a disproportionate number of minority students performing below the minimum standard. Thus school officials in these situations must be prepared to respond to challenges based on Title VI. Devising "culture free," fair tests is one way to respond to this challenge.

Future Directions

In many respects, those aboard the minimum proficiency testing bandwagon are much like Stripe, a caterpillar in Trina Paulus's Hope for the Flowers. When he asked,

> "Do you know what's happening?" Stripe replied, I just arrived myself. Nobody has time to explain; they are so busy trying to get wherever they're going up there. But what's at the top? No one knows that either but it must be awfully good because everybody's rushing there.[54]

The bandwagon should slow down so that those aboard can look at the scenery before they lose too much time and energy, and too much hardship and confusion accumulates.

Since litigation focusing on competency testing is still scarce, it is impossible to determine all the issues the courts may have to decide as a result of these programs. Certainly, each lawsuit will be decided on a program-by-program basis. The courts may well adopt the posture of judicial restraint on the grounds that proficiency testing falls within the sphere of educators and does not generally warrant judicial intrusion.

> While minimum [proficiency] testing will cause the educational system to become less pluralistic for all children its effects will weigh most keenly upon those who fail to pass the tests. Those who fail will receive a "certificate of attendance" rather than a high school diploma. The stigma which they will bear will be worse than that borne by those who drop out of school for their incompetence will have been certified. Indeed, because minimum [proficiency] testing does nothing to improve either teaching or learning, we may be sure that one result will be to hold the student responsible for the failure of the educational system.[55]

The public fervor over proficiency testing programs not only exacerbate some basic conflicts within the American society and educational profession, but it also points out the problems inherent in relying on legislation to

precipitate change before that proposed change is completely understood by those charged with its implementation. The courts have simply not yet defined with sufficient precision the legal guidelines for minimum competency testing programs. Thus, the scope of the issues destined to arise as a result of competency testing remain uncertain.

We need some form of student assessment, but the question remains whether minimum competency testing is the answer. Since this question does remain, educators must carefully scrutinize minimum competency testing programs if the inevitable legal challenges to this testing are to be withstood. More concretely, educators and legislators alike should be willing to learn from the few available cases as well as from those that emerge in the future so that we can minimize the injuries to our students.

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29. 444 F. 2d. 1078 (5th Cir. 1969)

30. 94 S.Ct. 786 (1974)

31. 414 F.2d. 1078 (5th Cir. 1969)

32. Civil No. C-70 RFR (N.D. Cal. January, 1970) Stipulated by agreement of the parties on February 5, 1970.

33. 426 U.S. 229 (1976)

34. 269 F. Supp. 401 (D.D.C.), aff'd sub nom. Smuck v. Hobson, 408 F.2d. 175 (D.C. Cir. 1969)

35. Id. at 469-485.

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37. 339 U.S. 306 (1950).

38. Case No. 78-653 R. Final Order, State of Florida, Division of Administrative Hearings, Tallahassee, Florida, June 15, 1978.

39. Id.

40. Id.

41. Case No. 78-1362 R, Petitioner's Memorandum of Law, State of Florida, Division of Administrative Hearings, Tallahassee, Florida, October 13, 1978.

42. Case No. 78-1363 R. Petitioner's Memorandum of Law, State of Florida, Division of Administrative Hearings, Tallahassee, Florida, October 13, 1978.

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48. Richard E. Fields and J. John Harris, "Educational Malpractice and The Public Demand for Teacher Accountability," Planning and Changing, Spring, 1978, p. 12.

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